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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GEORGE RAPPARD,

Plaintiff and Appellant,

v.

PROVIDENCE SAINT JOSEPH
MEDICAL CENTER et al.,

Defendants and Respondents.

B259473

(Los Angeles County
Super. Ct. No. BC435666)

APPEAL from judgments of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Reversed.

Johnson & Brahn, Jeffery W. Johnson and Vicki C. Gadbois for Plaintiff and Appellant.

Hernandez & Paglia, Rory M. Hernandez and Antoinette D. Paglia for Defendant and Respondent Providence Saint Joseph Medical Center.

Fenigstein & Kaufman, Ron S. Kaufman, John C. Keith;
and James R. Lahana for Defendant and Respondent
Professional Staff of Providence Saint Joseph Medical Center.

George Rappard filed a petition for writ of mandate challenging the suspension of his clinical privileges at Providence Saint Joseph Medical Center (Providence). The trial court dismissed the petition as moot after Rappard's privileges were reinstated. More than five months later and after the two-year statute of limitations on such actions had expired, Rappard filed an action for damages against Providence and others based on the suspension. The trial court granted summary judgment in favor of Providence and Professional Staff of Providence Saint Joseph Medical Center (Professional Staff) (collectively respondents) based on the statute of limitations. Rappard appealed from the judgments. He contends equitable tolling applies, extending the limitation period for filing his complaint for damages. We conclude the trial court improperly denied equitable tolling and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Parties*

Rappard is a Board certified diagnostic radiologist specializing in neurointerventional radiology (NIR), the use of minimally invasive technologies to treat vascular conditions of the brain, spinal cord, head and neck. Providence is a general

acute care hospital. Professional Staff is Providence's medical staff organization.

B. *The Suspension of Rappard's Privileges*

Professional Staff evaluates physicians' applications to become members of its organization and to obtain clinical privileges at Providence. To obtain privileges a physician must provide written confirmation that another physician with similar privileges has agreed to treat the applicant's patients when the applicant is unavailable. Rappard obtained such coverage agreements for certain services, including imaging and consulting services, and was granted privileges for those services in March and October 2006. In June 2007, Rappard was granted privileges to perform NIR procedures as well.

In February 2008, Rappard's covering physician for imaging services withdrew from the coverage agreement. Professional Services informed Rappard that the radiology department had withdrawn coverage for his NIR procedures and thereafter suspended Rappard's privileges and his medical staff membership. While Rappard was able to arrange coverage for some services in the following months, and his privileges for those services were reinstated, his NIR privileges remained suspended.

C. *Rappard's Petition for Writ of Mandate*

On October 31, 2008, Rappard filed a petition for writ of mandate against Providence, Professional Staff, and the chief of staff, challenging the suspension of his NIR privileges. He alleged the director of Professional Staff informed him on February 5, 2008 that "the radiology department was pulling its

coverage of his procedures” and that his medical staff membership and privileges were suspended as a result. Rappard alleged that Professional Staff’s bylaws did not authorize the suspension “based solely upon the fact that the department of radiology decided to pull it[s] coverage of his procedures.” He also alleged that the suspension of his privileges without a prior hearing violated his right to a fair procedure and due process. Rappard sought a peremptory writ of mandate setting aside the suspension of his NIR privileges and preventing respondents from interfering with his exercise of those privileges.

In February 2009, another physician applied to Professional Staff to provide coverage for Rappard’s NIR practice. In July 2009, while the writ petition was pending, Professional Staff approved the application and restored Rappard’s NIR privileges.

On November 9, 2009, the trial court conducted a hearing on the merits of Rappard’s writ petition. After receiving the administrative record into evidence, the court issued its ruling on that date, denying the writ. The court concluded that while Rappard’s petition appeared “to be meritorious,” Rappard was not entitled to mandamus relief because the petition was now moot in light of the reinstatement of his privileges.¹ The court thereafter

¹ The trial court in the writ proceeding concluded that the decision in *Andros v. Providence Saint Joseph Medical Center* (July 30, 2009, B207258) [nonpub. opn.] collaterally estopped Providence from suspending Rappard’s privileges without a hearing. The Court of Appeal in *Andros* had affirmed a judgment granting a peremptory writ of mandate in favor of another physician at the same hospital, holding that the governing bylaws did not authorize the physician’s summary suspension and that he was entitled to notice and a hearing.

dismissed the petition as moot. In its written ruling, the court rejected Rappard's argument that he needed issuance of a writ to preserve his ability to seek damages caused by his suspension. The court advised the parties: "Under [*Westlake Community Hosp. v. Superior Court*] (1976) 17 Cal.3d 465, Rappard does not need to exhaust any additional remedies (nor is any writ necessary) in order to pursue a damages claim for the period during which he was wrongfully suspended." "[*Westlake*] expressly provides," the court explained, "that when a doctor has been denied prior notice and a hearing in violation of due process and fair notice rights, he may immediately sue for damages without exhausting any administrative remedy. [Citation.] Rappard has nothing to exhaust, and may immediately sue for damages."

D. *Rappard's Complaint*

Five months later, on April 12, 2010, Rappard filed the instant action against Providence, Professional Staff, the chief of staff, three physicians and a radiology group, challenging his suspension and seeking damages. He alleged that two of the individual defendants, Drs. George Teitelbaum and Donald Larsen, had come to Providence in an effort to undermine Rappard's practice. When they informed the hospital administration that they would not work at Providence if Rappard had privileges at the hospital, the administration requested that the doctor then providing coverage for Rappard, Robert Cassling, withdraw his coverage. Rappard alleged that Professional Staff as a result summarily suspended his medical staff membership and privileges in February 2008 without a

hearing purportedly due to his lack of coverage. He conceded that his privileges were reinstated in July 2009.

Rappard alleged six causes of action arising out of the February 5, 2008 suspension of his privileges: (1) violation of his common law right to a fair procedure; (2) wrongful summary suspension of medical staff privileges; (3) intentional interference with prospective economic advantage; (4) intentional infliction of emotional distress; (5) negligent infliction of emotional distress; and (6) conspiracy to interfere with prospective economic advantage. Rappard subsequently filed a first amended complaint and then a second amended complaint, adding additional defendants and causes of action.

On October 29, 2012, Rappard filed his third amended complaint against Providence and Professional Staff only. He again alleged that Drs. Teitelbaum and Larsen came to the hospital to undermine his NIR practice at Providence, and that the hospital administration facilitated their efforts by demanding that Dr. Cassling withdraw his coverage, resulting in Rappard's loss of privileges. Rappard further alleged that the hospital administration and medical staff thwarted his attempts to designate a covering physician. He alleged that Professional Staff's bylaws did not authorize the suspension of his medical staff membership and privileges, and he was entitled to a hearing before any suspension. In the third amended complaint, Rappard alleged causes of action for (1) violation of his common law right to a fair procedure; (2) wrongful interference with medical staff privileges; and (3) intentional interference with prospective economic advantage.

Providence demurred to the third cause of action for intentional interference with prospective economic advantage.

On December 19, 2012, the trial court sustained the demurrer without leave to amend based on Rappard's failure to allege a preexisting relationship. The parties stipulated to dismiss the third cause of action as to both defendants, and on March 20, 2014 the court ordered the dismissal.

E. *Respondents' Summary Judgment Motions*

Providence and Professional Staff both moved for summary judgment against the third amended complaint, arguing that the two-year statute of limitations of Code of Civil Procedure section 339, subdivision 1, barred the complaint, among other arguments.² They argued that Rappard's claims accrued on February 5, 2008, more than two years before he filed his initial complaint on April 12, 2010.

Rappard argued in opposition to the summary judgment motions that the statute of limitations was equitably tolled during the period that his writ proceeding was pending. He filed his own declaration and a declaration by his attorney in support of his opposition. Rappard also filed a request for judicial notice of documents filed in *Andros v. Providence Saint Joseph Medical Center, supra*, B207258.

The trial court concluded that Code of Civil Procedure section 339, subdivision 1, applied, barring Rappard's complaint, and equitable tolling was inapplicable. The court stated in

² The parties agree that the two-year statute of limitations set forth in Code of Civil Procedure section 339, subdivision 1, governing actions based on oral contract, applies to the two remaining causes of action. The trial court concurred, citing *Edwards v. Fresno Community Hosp.* (1974) 38 Cal.App.3d 702, 705-706.

relevant part: “[T]he [c]ourt finds that [Rappard] has not raised a triable issue of fact concerning the application of equitable tolling. His argument simplifies the mandate proceeding and wholly fails to address the elements necessary for the application of this principle. A review of [the judge’s] ruling indicates the allegations put forth in [Rappard’s] writ of mandate were more limited than what has been alleged in this case. In the earlier action, [Rappard] alleged he was suspended without notice and sought only reinstatement. Presently, he not only seeks damages but alleges his suspension was the result of an alleged . . . scheme to push him out of the hospital in favor of two outside physicians. Further, it is apparent that [Rappard] had time, within the limitations period, after the November 2009 dismissal of his mandate action, to file a timely complaint.”

F. *The Judgments and Appeal*

On August 14, 2014 and September 2, 2014, the trial court entered judgments in favor of Providence and Professional Staff. Rappard timely appealed from the judgments.

DISCUSSION

A. *Standard of Review*

A defendant is entitled to summary judgment if there is no triable issue of material fact and the defendant is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c); *Salas v. Sierra Chemical Co.* (2014) 59 Cal.4th 407, 415.) A defendant moving for summary judgment has the initial burden of presenting evidence that a cause of action lacks merit because the plaintiff cannot establish an element of the cause of action or

there is a complete defense. (Code Civ. Proc., § 437c, subd. (p)(2).) If the defendant satisfies this burden, the burden shifts to the plaintiff to present admissible evidence creating a triable issue of material fact. (*Rondon v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 1367, 1373-1374.) We review the trial court's ruling de novo, liberally construing the evidence in favor of the party opposing summary judgment and resolving all doubts concerning the evidence in favor of that party. (*State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1017-1018.)

Respondents argue that where a court grants or denies summary judgment on the basis of equitable tolling, the proper standard of review is abuse of discretion, notwithstanding the ordinary de novo review at summary judgment. Respondents cite several court of appeal decisions which have so held. (E.g., *GuideOne Mutual Ins. Co. v. Utica National Ins. Group* (2013) 213 Cal.App.4th 1494, 1501; *Blix Street Records, Inc. v. Cassidy* (2010) 191 Cal.App.4th 39, 47; *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 639-640; *Dieden v. Schmidt* (2002) 104 Cal.App.4th 645, 654; *Prata v. Superior Court* (2001) 91 Cal.App.4th 1128, 1135.) The rationale, announced by yet another court of appeal, relates to the unique situation wherein a trial court is asked to exercise its equitable powers at summary judgment: "It is of course true that, in general, appellate review of a trial court's decision to grant or deny a summary judgment motion is on the basis of a de novo examination of the evidence before the trial court and an independent determination of its effect as a matter of law. [Citation.] This rule is applicable in the usual case, in which the questions presented upon the motion for summary judgment are matters of law not involving the exercise of judicial discretion. [Citation.] However, in the limited

and exceptional circumstances where a trial court is required to exercise its discretion in passing on a Code of Civil Procedure section 437c motion for summary judgment, and grants or denies such a motion on the basis of its equitable determination of a question as to which the exercise of judicial discretion is proper, the standard of review on appeal necessarily is whether the trial court's decision amounted to an abuse of discretion. [Citations.]” (*Centennial Ins. Co. v. United States Fire Ins. Co.* (2001) 88 Cal.App.4th 105, 110-111.)

While these decisions advance a forceful argument that a more deferential standard of review is warranted when the motion turns on the court exercising its equitable powers, this court declines to follow these decisions as they are inconsistent with Supreme Court precedent. (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 96-97 (*McDonald*) [court's grant of summary judgment denying equitable tolling argument advanced by plaintiff subject to de novo review]; *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 67-68 [court of appeal erred by reviewing summary judgment granted on equitable defense of laches using “deferential abuse of discretion standard”].) Moreover, because the underlying facts in this case are largely undisputed—relating to filing dates and allegations in the operative complaints—the de novo standard of review is particularly appropriate. (See, e.g., *Mt. Holyoke Homes, LP v. California Coastal Com.* (2008) 167 Cal.App.4th 830, 840 [in ruling on a claim of equitable estoppel, where the underlying facts are undisputed and the issue is whether such facts constitute sufficient legal basis for estoppel, the decision presents a question of law reviewed de novo].)

B. *The Doctrine of Equitable Tolling*

The doctrine of equitable tolling suspends or extends the statute of limitations for a cause of action while the plaintiff pursues a separate legal remedy. (*McDonald, supra*, 45 Cal.4th at pp. 99-100; *Addison v. State of California* (1978) 21 Cal.3d 313, 317-319.) Equitable tolling is “designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff’s claims—has been satisfied.” [Citation.]” (*McDonald, supra*, at p. 99.) “Thus, it may apply where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason.” (*Id.* at p. 100; see *Collier v. City of Pasadena* (1983) 142 Cal.App.3d 917, 923.)

The primary purpose of statutes of limitations is to prevent the assertion of stale claims after evidence is no longer available. (*Addison v. State of California, supra*, 21 Cal.3d at p. 317; *Elkins v. Derby* (1974) 12 Cal.3d 410, 417.) If a prior proceeding put the defendant on notice of the defendant’s potential liability in a later proceeding, the defendant ordinarily would not be prejudiced by tolling the limitations period for the later proceeding, and it would not serve the purpose of the statute of limitations to bar the later proceeding. (*Addison, supra*, at p. 319; *Elkins, supra*, at pp. 417-418.) Moreover, it would be wasteful and inequitable to require the plaintiff to pursue both remedies at the same time when one remedy could obviate the other, in whole or in part. (*McDonald, supra*, 45 Cal.4th at p. 100; *Addison, supra*, at p. 319; *Elkins, supra*, at pp. 419-420.)

Equitable tolling requires a showing of (1) timely notice to the defendant by filing of the first claim; (2) lack of prejudice to the defendant; and (3) reasonable and good faith conduct by the plaintiff. (*McDonald, supra*, 45 Cal.4th at p. 102; *San Pablo Bay Pipeline Co., LLC v. Public Utilities Com.* (2015) 243 Cal.App.4th 295, 316.) The party invoking equitable tolling has the burden of proving that the doctrine applies. (*In re Marriage of Zimmerman* (2010) 183 Cal.App.4th 900, 912; *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [“Equitable tolling requires that three essential elements must be satisfied by the party seeking tolling”].)

Notice was timely if the plaintiff commenced the first proceeding within the limitations period. (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2.) The second element, lack of prejudice, is satisfied if the facts involved in the two proceedings are so similar that the defendant’s investigation of the first claim would enable the defendant to fairly defend the second claim. (*Ibid.*) ““The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California, supra*, 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended.” [Citation.]’ [Citation.]” (*Ibid.*)

The Supreme Court has instructed that “courts . . . have, and should, ‘liberally appl[y] tolling rules or their functional equivalents to situations in which the plaintiff has satisfied the notification purpose of a limitations statute.’ [Citation.]” (*McDonald, supra*, 5 Cal.4th at p. 102.)

Acknowledging that there is not “a single, settled understanding of the term” equitable tolling, the Supreme Court recently explained that “the most common understanding’ of

tolling [is] a temporary abatement or suspension of the running of a time period. [Citations.] However, tolling may refer not only to the suspension of a statute of limitations, but also its extension [citation] or its renewal or revival [citation].” (*City of Los Angeles v. County of Kern* (2014) 59 Cal.4th 618, 624-625.) The court in *City of Los Angeles* parsed out two strands of equitable tolling relevant here: the “‘suspension’ approach” and the “‘grace period’” approach. Under the “‘suspension’ approach,” the original complaint stops the running of the statute of limitations, the court explained, and allows the plaintiff “to tack on however much time remained [on the limitations period] when the claim was originally filed.” (*Id.* at p. 625.) Under the “‘grace period’” approach, the court allows some reasonable period of time after the original action is dismissed to file the new action. (*Ibid.*) Although resulting in dramatically different tolling periods, neither approach has been adopted conclusively by the courts.

The California Supreme Court has expressed shifting support for the two tolling theories, without affirmatively adopting either one or foreclosing the other. In *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 674, the court explained that “[t]olling may be analogized to a clock that is stopped and then restarted. Whatever period of time that remained when the clock is stopped is available when the clock is restarted, that is, when the tolling period has ended.” [Citation.]” *Lantzy v. Centex Homes* (2003) 31 Cal.4th 363 also appeared to endorse the view of equitable tolling as an actual suspension of the statute of limitations: “[T]he effect of equitable tolling,” the court stated, “is that the limitations period *stops running* during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the tolled interval, no

matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred.” (*Id.* at pp. 370-371, fn. omitted.)

By contrast, in *City of Los Angeles v. County of Kern*, *supra*, 59 Cal.4th 618 the court expressed discomfort with the concept of suspension, which could extend a statute of limitation by many years while a plaintiff pursued other remedies. The court there was asked to construe the language of 28 United States Code section 1367(d), the federal statute governing the limitations period for refiling of supplemental state claims upon dismissal by the district court.³ In construing Congress’ intent in use of the term “toll,” the court noted that the suspension approach would greatly extend the time for filing in many cases. It gave as an example a situation where a case’s three-year journey through federal court could result in a three-year statute of limitations

³ 28 United States Code section 1367(d) provides: “The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.” Reviewing numerous state and federal decisions from around the country interpreting the phrase, ““shall be tolled while the claim is pending,”” the court observed that the courts were evenly divided as to whether Congress intended this language to mean that state statutes of limitations were “suspended” while a claim was pending in federal court, or whether there should simply be a 30-day grace period after dismissal for refiling. (*City of Los Angeles v. County of Kern*, *supra*, 59 Cal.4th at p. 627 [reviewing cases].)

doubling to a six-year statute under the suspension approach, subjecting “a defendant to three additional years of doubt as to whether a further suit would follow and during which the defendant would need to try to preserve evidence and guard against fading memories.” (*City of Los Angeles, supra*, at p. 627.) Without expressing any opinion about whether that might be the result favored by California courts, the court stated that it would not impute such an intent to Congress without firmer evidence, which it could not find in the language of the statute or legislative materials. (*Id.* at p. 633; see also *Wood v. Elling Corp.* (1977) 20 Cal.3d 353, 359-360 [rejecting a plaintiff’s argument that a first action suspended the statute of limitations during its pendency and allowed the filing of an identical case after the statute of limitations had expired; “[i]f a timely action dismissed without prejudice were, without more, to have the effect of tolling the statute of limitations during the pendency of that action, an indefinite extension of the statutory period—through successive filings and dismissals—might well result”].)

The courts of appeal also have expressed reservations about the suspension approach. (Compare *Thomas v. Gilliland* (2002) 95 Cal.App.4th 427, 431 [rejecting what the court described as a “nonsensical proposition that a party plaintiff may freeze any unused part of the statute of limitations to be thawed out when needed”]; *Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 410 [allowing a party to exclude from limitations computation the entire interval the first action was pending would do “significant harm to the statute of limitations policy”].)

On appeal, Rappard obviously relies on the first approach—that the statute of limitations actually stopped during the pendency of his writ proceeding. He argues that the statute of

limitations must be extended by the number of months still remaining on the statute of limitations' clock when his writ petition was filed, in this case by an additional 16 months. Under this theory, he did not need to file the complaint until three years and four months after the original February 2008 suspension, easily bringing his initial complaint for damages within the limitations period.

We need not resolve which approach to equitable tolling—suspension or grace period—is mandated by the case law, as we find that under either approach, Rappard has established the appropriateness of equitable tolling in this case.

C. *The Trial Court Erred in Holding Equitable Tolling Inapplicable*

Rappard filed his initial complaint in this action on April 12, 2010, approximately 67 days after the expiration of the two-year statute of limitations based on the February 5, 2008 suspension of his medical staff membership and privileges.

Providence and Professional Staff satisfied their initial burden as the parties moving for summary judgment based on the two-year statute of limitations by presenting evidence that Rappard filed his complaint more than two years after the challenged suspension of his medical staff membership and privileges. The burden therefore shifted to Rappard to present admissible evidence establishing a basis for equitable tolling.

In his brief in opposition to the summary judgment motions, Rappard argued that respondents were on notice based on his writ petition that he was challenging his suspension, they were apprised by the trial judge's ruling that his suspension was wrongful and that he could seek damages, and his pursuit of writ

relief was not only reasonable but also mitigated his damages by forcing restoration of his privileges. He relied heavily on *Elkins v. Derby*, *supra*, 12 Cal.3d 410, which held the statute of limitations on a plaintiff's personal injury action was tolled for the period during which the plaintiff pursued a workers' compensation remedy against the same defendant.

Respondents argue, and the trial court apparently agreed, that in his opposition to the summary judgment motions, Rappard did not explain adequately the reason for the five-month delay between the dismissal of his writ petition and the filing of his initial complaint in this action, or the more than two months that passed after the running of the two-year statute of limitations. It is true that the only evidence Rappard presented was his own declaration, which did not address the delay, and the declaration of his attorney, Jeffrey Johnson, attaching various communications leading up to the initial suspension in February 2008. The Johnson declaration did not explain why the complaint was filed after expiration of the statute of limitations, nor did it address, directly or indirectly, why the respondents suffered no prejudice from the delay.

The trial court found on this record Rappard had not established entitlement to equitable relief because respondents were not on notice of the extent of his claims and he had not established good cause for the several month delay between the termination of the writ petition and the filing of his damages complaint. Construing all evidence in favor of Rappard, we find the trial court erred in declining to apply the doctrine of equitable tolling on the undisputed facts presented below.

1. *Equitable Tolling May Apply in the Same Forum*

At the outset we consider and reject respondents' argument that Rappard cannot invoke equitable tolling because the writ petition and the damages action were both filed in the superior court and the doctrine does not apply to successive lawsuits filed in the same forum. Respondents rely on two decisions stating that equitable tolling cannot be raised where the second action is filed in the same forum as the first: *Martell v. Antelope Valley Hospital Medical Center* (1998) 67 Cal.App.4th 978, 985 and *Thomas v. Gilliland*, *supra*, 95 Cal.App.4th 427.⁴ Those cases are distinguishable, as neither involved a civil suit for damages following a petition for mandamus relief which would limit or remove altogether the need for a damages suit. The plaintiff in *Martell* had filed a suit for damages, voluntarily dismissed it after two years, and refiled five years later, after the time period ran, a scenario bearing no relation to the facts here. The court rejected the plaintiff's argument that his claim was tolled for the two years, explaining: "a party's voluntary dismissal without prejudice does not come equipped by law with an automatic tolling or waiver of all relevant limitations periods; instead, such a dismissal includes the very real risk that an applicable statute of limitations will run before the party is in a position to renew the dismissed cause of action." [Citation.]” (*Martell*, *supra*, at

⁴ *Martell* assumed that equitable tolling, if available, would suspend the statute of limitations; even under that generous standard, which added 27 months to the six-month filing period, the plaintiff could not invoke equitable tolling because he filed his complaint beyond even that extended statute of limitations. (*Martell v. Antelope Valley Hospital Medical Center*, *supra*, 67 Cal.App.4th at p. 984.)

p. 984.) *Thomas* addressed a similar scenario—a plaintiff seeking to tack on time spent in an earlier damages action which the plaintiff had voluntarily dismissed—and for that reason bears little resemblance to Rappard’s election to pursue a writ petition for reinstatement prior to initiating suit for damages. Respondents also ignore other cases which have found equitable tolling when both filings are in the same forum. (E.g., *Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494 [second petition for writ of mandamus filed in same court allowed to proceed under equitable tolling principles].)

On analogous facts, the court in *Myers v. County of Orange* (1970) 6 Cal.App.3d 626 applied equitable tolling, rejecting the defendants’ argument that the doctrine did not apply when the plaintiff pursued mandamus relief prior to filing a suit for damages. In *Myers*, the plaintiff had pursued a petition for writ of mandate to compel Orange County’s Retirement Board to rescind a termination relating to her deceased husband’s employment, which was impacting her entitlement to benefits. After the writ petition was dismissed, she brought a suit for damages against the county. The county argued that because there was no requirement the plaintiff first pursue the writ, she could not claim equitable tolling during the period the writ was pending. The court disagreed, finding that while the writ petition was not a prerequisite to a suit for damages, it was reasonable for the plaintiff to pursue such relief, which could have lessened or removed altogether the need for a damages action. (*Id.* at pp. 635-636.)

We agree with *Myers* that equitable tolling can be invoked by a plaintiff who reasonably seeks one remedy by writ petition

and later seeks damages as part of a civil suit, even if ultimately brought in the same court. The pursuit of alternative remedies which could limit damages and reduce the consumption of time in the trial courts fully meets the policy goals undergirding equitable tolling. (*Addision v. State of California, supra*, 21 Cal.3d at p. 317 [“general policy which favors relieving [the] plaintiff from the bar of a limitations statute when, possessing several legal remedies he, reasonably and in good faith, pursues one designed to lessen the extent of his injuries or damage”].) Of course, the petitioner must also satisfy the three-prong test announced by the Supreme Court in *McDonald*.

2. *Timely Notice*

Comparing the writ petition to the operative complaint, Rappard established that respondents had adequate notice of the claims against them based on the initial writ petition, which named both Providence and Professional Staff as respondents.⁵

⁵ The parties and the trial court focused on the differences between the writ petition and the third amended complaint. We believe this focus is too narrow. The proper inquiry is an examination of the original complaint, which was filed just beyond the statute of limitations, to ascertain whether a party served with that complaint would have had adequate notice of the plaintiff’s alleged injury based on the prior writ petition. Subsequent amendments relate back provided they “(1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one. [Citations.]” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 409.) The third amended complaint is relevant primarily because it frames the legal theories or causes on which the plaintiff has elected to proceed at the time of the motion for summary judgment.

In the petition, Rappard alleged the hospital suspended his privileges on February 5, 2008 without providing him a hearing, in violation of Providence's bylaws and, even after the reinstatement of certain privileges, his NIR privileges remained suspended. He alleged that Providence "possessed, and continues to possess, substantial power either to prevent [his] pursuit of his lawful profession . . . and . . . the power to control [his] access to vital professional privileges." Alleging that respondents' actions were "arbitrary and capricious," he asserted that the suspension deprived him of due process, a "vested property right." "By reason of the summary suspension," he alleged he had "suffered damage[s] to his reputation both in the [h]ospital and in the medical community," and other irreparable injury and damage, "the exact nature and extent of which are difficult to ascertain at this time."

While it is true that in the writ petition Rappard did not allege any motive on the part of Providence, any conspiracy or involvement by third parties, or describe his damages in greater detail, the gravamen of the later complaint for damages was the same: Providence and Professional Staff denied him privileges, causing him to suffer damages, including damage to his reputation. The two causes of action which were stated in the original complaint and remain in the third amended complaint do not significantly expand on that central claim.

The first cause of action for "Violation of Common Law Right to Fair Procedure" is based solely on the suspension of Rappard's privileges without a hearing. In the original complaint, Rappard sought damages based on this cause for damage to his "reputation as a physician," "lost earnings," and "substantial mental injury, anxiety, worry, mental and emotional

distress, shame, and hurt feelings.” By the third amended complaint, this cause of action had been severely pruned, removing any request for emotional distress damages, but leaving a request for “lost earnings” and damage to his “character and reputation.” The second cause of action in the original complaint for “Wrongful Summarily [*sic*] Suspension” was based on the suspension without notice or hearing rights and alleged Rappard’s “reputation as a physician was irreparably injured” and he “suffered serious harm.” By the third amended complaint, this cause had been modified to “Wrongful Interference with Medical Staff Privileges.” With this cause Rappard alleged he had a vested right to retain his staff privileges at Providence, with which respondents wrongfully interfered when suspending him without a substantive basis, causing him to suffer certain economic damages: “loss of income, financial damage to his medical practice, and loss of professional reputation.”

Respondents claim that they did not have fair notice because the complaint for damages “raise[d] and assert[ed] a panoply of widely different and divergent facts, charges and allegations accusing Providence of orchestrating a scheme to improperly remove [Rappard] from [Providence].” Respondents overstate the differences between the pleadings. First, the only two causes of action which remain at summary judgment are based on the same core allegation: respondents wrongfully terminated Rappard’s privileges, interfering with his professional practice and reputation. Even if the complaint now alleges a motive and names various “bad actors,” those allegations do not transform these causes of action into new claims. (See *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 514 [“Conspiracy is not an independent tort; it cannot create

a duty or abrogate an immunity. It allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles. [Citations.] Because a party to a contract owes no tort duty to refrain from interference with its performance, he or she cannot be bootstrapped into tort liability by the pejorative plea of conspiracy.”]; *Gold v. Los Angeles Democratic League* (1975) 49 Cal.App.3d 365, 373, fn. 3 [“Punitive damages are merely incident to a cause of action and can never constitute the basis thereof”].)

Moreover, Rappard has conceded on appeal that he does not intend to pursue a claim for punitive damages against respondents. This judicial admission fully addresses respondents’ argument they did not have adequate notice of the conspiracy allegations supporting a claim for punitive damages.⁶

⁶ Evidence of ill-will on the part of respondents is still relevant, however, to defeating the privileges asserted by respondents under Civil Code sections 43.7, 43.8 and 47, which provide a qualified immunity only to those members of a hospital’s professional staff who act without “malice.” (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 720 [“a plaintiff may defeat a claim of privilege under (Civ. Code, §) 43.8 by proving that the communicator knew the information was false or otherwise lacked a good faith intent to aid in the evaluation of the practitioner”]; *Smith v. Adventist Health System/West* (2010) 190 Cal.App.4th 40, 59-60 [absolute privilege contained in Civ. Code, § 47, subd. (b)(4), should not be interpreted so broadly that it eliminates actions for damages against a hospital and its professional staff resulting from wrongful denial of a doctor’s hospital privileges as such a broad application of the privilege would render superfluous the qualified privileges under Civ. Code, §§ 43.7 and 43.8].) As the

Based on the allegations in the initial writ, respondents were alerted that they needed to begin investigating the reason for the suspension, the process by which it was implemented, and whether Rappard suffered any resulting injuries. Reasonable inquiry would have led respondents to inquire of their own professional staff as to why Rappard's privileges had been terminated, who was responsible for such termination, whether the hospital's procedures had been followed, and whether the denial of privileges had interfered with Rappard's treatment of patients, medical practice and reputation. Indeed, even though he could not obtain damages through the writ process, Rappard had expressly stated in the petition that he wanted compensation for the economic and reputation injuries he had suffered. These allegations in the writ petition gave respondents fair notice that Rappard might seek to hold them accountable for damages once the writ petition was resolved. The law was well-established at the time that a doctor could pursue a damages action against a hospital and professional staff for wrongful revocation of privileges if the hospital provided no hearing or notice before revocation. (*Westlake Community Hosp. v. Superior Court*, *supra*, 17 Cal.3d at p. 485; *Smith v. Adventist Health System / West*, *supra*, 190 Cal.App.4th at pp. 58-59 [discussing history].)

3. *Lack of Prejudice*

For the same reasons, Rappard has established the second prong of the equitable tolling test: lack of prejudice to

privileges found in the Civil Code are most often raised as a defense to an action for damages, it is not even certain that Rappard had to plead allegations of malice in his original complaint.

respondents. This ““second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant’s investigation of the first claim will put him in a position to fairly defend the second.”” (*McDonald, supra*, 45 Cal.4th at p. 102, fn. 2; *Downs v. Department of Water & Power* (1997) 58 Cal.App.4th 1093, 1100; *Dowell v. County of Contra Costa* (1985) 173 Cal.App.3d 896, 903 [“the doctrine of equitable tolling applies only where the plaintiff commences a second action which is in reality a continuation of an earlier action involving the *same* parties, facts and cause of action”].) Here, respondents are the same as those named in the writ petition, and the claims are so similar that an investigation of the denial of Rappard’s privileges undertaken to defend the writ petition would have put respondents in a fair position to defend against the claim for damages. Providence’s assertion that it was prejudiced by “widely disparate allegations” because it “forever lost the important opportunity to conduct a timely investigation and gathering of evidence while memories and facts were still fresh” strains credulity. It is unclear how 26 months after the suspension, in the face of a suit for damages of which it had prior notice, respondents were deprived of the ability to interview witnesses and explore memories before they faded. Indeed, under respondents’ argument, Rappard would have been better served by not identifying any doctors as bad actors in the complaint for damages, filing instead a bare bones complaint, and requiring respondents to learn the names of those involved through ordinary discovery, which might not even *commence* until well after the two-year statute of limitations had run.

4. *Reasonable Conduct by Plaintiff*

While the good faith requirement is not fully fleshed out in Supreme Court precedent, the focus of this final element appears to be Rappard's motivation in filing the first action—was it done to gain an advantage or delay the proceedings or was it undertaken in good faith. (See *Elkins v. Derby*, *supra*, 12 Cal.3d at p. 414 [“regardless of whether the exhaustion of one remedy is a prerequisite to the pursuit of another, if the defendant is not prejudiced thereby, the running of the limitations period is tolled ‘[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one’”]; accord, *McDonald*, *supra*, 45 Cal.4th at p. 100 [equitable tolling applies “where one action stands to lessen the harm that is the subject of a potential second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason”].)

Respondents miss the mark, therefore, when they focus on whether Rappard acted in good faith when he waited five months after denial of the writ petition and two months after the running of the statute of limitations to initiate the damages suit. For the same reason, we can dispense with their attack on Rappard's weak explanation at the summary judgment hearing for the late filing. The good faith inquiry examines primarily whether Rappard's motivation in filing the *first action* was reasonable. In the instant case, it was completely appropriate for Rappard to pursue the writ of mandamus action, as it provided alternative relief which could have remedied or lessened his damages by having his privileges reinstated. Pursuit of a writ proceeding benefited the courts, as the writ could reduce the costs associated

with duplicative filings, “in many instances rendering later court proceedings either easier and cheaper to resolve or wholly unnecessary.” (*McDonald, supra*, 45 Cal.4th at p. 100; *Collier v. City of Pasadena, supra*, 142 Cal.App.3d at p. 926.) Moreover, the law with respect to exhausting mandamus relief was sufficiently complex at the time that a doctor in Rappard’s position could reasonably conclude that he had to file a mandamus action in order to preserve his right later to bring a damages action. (See, e.g., *Smith v. Adventist Health System / West, supra*, 190 Cal.App.4th 40; *Payne v. Anaheim Memorial Medical Center, Inc.* (2005) 130 Cal.App.4th 729.)

It is true that some courts have examined the good faith of the plaintiff in the timing and handling of a second action. For example, courts have explained that the requirement of good faith and reasonable conduct may turn on whether “a plaintiff delayed filing the second claim until the statute on that claim had nearly run” or “whether the plaintiff [took] affirmative actions which . . . misle[d] the defendant into believing the plaintiff was foregoing his second claim.” (*Collier v. City of Pasadena, supra*, 142 Cal.App.3d at pp. 926, 932.) Even if we consider the facts of this case under this alternate analysis, there is no evidence of the type of conduct courts have found to warrant denial of equitable relief. (E.g., *Thomas v. Gilliland, supra*, 95 Cal.App.4th at pp. 434-435 [the plaintiff dismissed and re-filed complaint on the same day, after the statute of limitations had expired, with the express purpose of getting a new trial because the plaintiff’s counsel was unavailable on the scheduled trial date in the first action]; *Hu v. Silgan Containers Corp.* (1999) 70 Cal.App.4th 1261, 1264-1265 [equitable tolling could not save a second action filed after the statute of

limitations where the first action was voided due to the plaintiff's failure to pay court fees]; *Mitchell v. Frank R. Howard Memorial Hospital* (1992) 6 Cal.App.4th 1396, 1407-1408 [equitable tolling "not available to a plaintiff who engages in the procedural tactic of moving the case from one forum to another in the hopes of obtaining more favorable rulings"].)

Moreover, we point out that under the "suspension" approach to equitable tolling, on which Rappard certainly could have relied given its approval by the California Supreme Court in two decisions, he had until March 2011 to bring a complaint for damages. It was reasonable, given the uncertainty in the law on tolling, to file the complaint on April 12, 2010; while this date fell *after* the two-year statute of limitations would have ordinarily run, it was *well within* the period allowed under a "suspension" approach.

Even if we were to view this case under the stricter "grace period" theory of equitable tolling, the filing two months after the running of the strictest statute of limitations appears reasonable given the active engagement of the parties in the writ proceeding and the short time between dismissal of that action and the filing of the civil suit for damages.

Respondents argue nonetheless that the five months between dismissal of the mandamus proceeding and filing of the damages action is unreasonable as a matter of law, denying Rappard the ability to invoke equitable tolling. While it is true that unjustified delay will bar application of the doctrine, there is no bright line rule as to how long a delay will qualify for relief. (*Elkins v. Derby, supra*, 12 Cal.3d at p. 413 [second action permitted where it was filed four months after the statute of limitations would ordinarily have run]; *Hopkins v. Kedzierski*

(2014) 225 Cal.App.4th 736, 745 [the plaintiff allowed to file complaint 128 days beyond the limitations period].) Moreover, many of the cases relied upon by respondents are inapposite, because they address the unique situation where a plaintiff files a supplemental claim in state court after dismissal of a federal action. Because the second filing is governed by federal statute, which provides for only a 30-day grace period, the courts of this state have declined to extend the filing date much beyond that statutory grace period. (*City of Los Angeles v. County of Kern*, *supra*, 59 Cal.4th at pp. 633-634; *Kolani v. Gluska*, *supra*, 64 Cal.App.4th at p. 411 [“what conduct is ‘reasonable’ under the ‘equitable tolling’ doctrine must be assessed in light of the existence of the 30-day ‘grace period’ in 28 United States Code section 1367(d). It was not ‘reasonable’ for [the] appellants to refile much later than 30 days after the prior dismissal, in the face of section 1367(d)’s express 30-day requirement, absent a state statute extending that period, and absent some extraordinary circumstance justifying the delay.”]) As Rappard points out, there is no statutory bright line governing this case against which the court is compelled to judge “reasonableness,” as exists with 28 United States Code section 1367. On the record before us, we find the two-month delay in this case to be reasonable and taken in good faith.

Given that we reverse the trial court’s grant of summary judgment, we need not address one obvious error in the trial court’s ruling: it disregarded allegations in the complaint which plainly occurred within the two-year statute of limitations. The third amended complaint alleges that “[a]fter the July 9, 2009 reinstatement of privileges, [Providence] and [Professional] Staff engaged in a continuing campaign of harassment and

intimidation This campaign included false and pretextual accusations of wrongful conduct and threats of investigation, and imposition of another improper suspension of Dr. Rappard's privileges" This allegation is incorporated into and forms an additional basis for Rappard's second cause of action for "Wrongful Interference with Medical Staff Privileges." These allegations, on their face, relate to a time frame that is within the applicable statute of limitations without invocation of equitable tolling. Rappard's declaration in opposition to summary judgment contained further details, albeit spare, of the "campaign" waged against him after his privileges were reinstated in July 2009 by Providence and Professional Staff.

In his opening brief, Rappard's counsel states that he is not pursuing claims related to the 2010 suspension. However, he apparently has not dropped claims based on this later harassing and intimidating conduct, short of suspension. In his reply brief, Rappard argues that a suit for relief although partially time-barred as to older events may still be timely and allowed to proceed as to the events within the applicable limitations period, a position with which we agree.

This court may affirm the grant of summary judgment to respondents on any ground supported by the record. Having reviewed the entirety of the two motions for summary judgment, we find there are triable issues of fact which warrant denial of those motions. We have not considered or addressed the request for summary adjudication of the claim for punitive damages, as Rappard concedes on appeal that he is no longer pursuing such damages.

DISPOSITION

The judgment is reversed. Rappard is entitled to costs on appeal.

KEENY, J.*

We concur:

PERLUSS, P. J.

SEGAL, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.